No. 402

JAN 5 1946

IN THE

Supreme Court of the United States

October Term, 1945.

BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.

BRIEF FOR THE RESPONDENT.

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INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Summary of argument	9
Argument:	
I. The Defense of Illegal Practices Under the Robinson-Patman Act is not Available in a State Court Suit on Renewal Promissory Notes to Void the Indebtedness	12
A. Petitioner's position is that a purchaser in the ordinary course of business may refuse to pay the sales price for goods purchased on the ground that collateral illegality renders the contract unenforceable by the seller	12
B. The Robinson-Patman Act does not render illegal the sales transactions between petitioner and respondent	15
C. The refusal to enforce a contract restraining trade in violation of the Sherman Act is readily distinguishable	20
D. The legislative history of the Robinson-Patman Act affords no foundation for the defense interposed	25
E. Practical considerations militate against a construction saddling Federal and State courts with the burdens attendant upon such a defense as petitioner asserts	26
F. Practical business considerations show that Congress could not have intended to allow a de-	

Page

fense of voidness, based on collateral Robinson-Patman Act violations, to a suit on promissory notes 28

II. The Court Below Properly Ruled That on the Facts Developed in the Pre-Trial Conference the Summary Entry of Judgment Should be Affirmed..... 31

A. There was no departure from accepted State practice in the proceedings below..... 31

B. No unlawful discrimination occurred in the sale of small cans 33

C. Since there was no illegal discrimination as to individual service cans and since petitioner failed to identify the portion of its indebtedness arising out of sales of other than individual service cans, respondent was entitled to summary judgment 37

D. Respondent's quantity discounts were justified and were not improper discrimination 38

Conclusion 47

CITATIONS.

CASES:

In the Matter of American Optical Co., 28 F. T. C. 169 42
Rement & Sons v. *National Harrow Co.*, 186 U. S. 70 21
In the Matter of Bissell Carpet Sweeper Co., F. T. C. Docket No. 4636..... 44
Brash v. *Ehrman*, 56 Fla. 153, 47 So. 937..... 31
In the Matter of H. C. Brill Co., Inc., 26 F. T. C. 666 42
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545 ..... 22, 23
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227..... 21
Corn Products Co. v. *Federal Trade Commission*, 324 U. S. 726..... 35
Dent v. *Ferguson*, 132 U. S. 50..... 14
Embrey v. *Jemison*, 131 U. S. 336..... 21
Erie R. Co. v. *Tompkins*, 304 U. S. 64..... 26

Page

Farmers' & Mechanics' Nat. Bank v. *Dearing*, 91 U. S. 29 ..... 22, 24
Federal Trade Commission v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 35
Geddes v. *Anaconda Copper Mining Co.*, 254 U. S. 590 ..... 22, 24
Gesellschaft Fur Drahtlose Telegraphie M.B.H. v. *Brown*, 78 F. (2d) 410, 415 (App. D. C., 1935), *cert. den.* 296 U. S. 618, s. c. 104 F. (2d) 227 (App. D. C., 1939) 14
Gibbs v *Baltimore Gas Co.*, 130 U. S. 396 14
In the Matter of Goodyear Tire & Rubber Co., 22 F. T. C. 232 ..... 27, 43, 44
Harriman v. *Northern Securities Co.*, 197 U. S. 244 14
Harris v. *Runnels*, 12 How. (53 U. S.) 79 15
Hillsborough County v. *Sutton*, 8 So. (2d) (Fla.) 401 ..... 7, 31, 32
In the Matter of Kraft-Phenix Cheese Corp., 25 F. T. C. 537 ..... 18, 44
Loughran v. *Loughran*, 292 U. S. 216, 228 ..... 22, 23
In the Matter of Master Lock Co., 27 F. T. C. 982 42
Oliver Bros. Inc. v. *Federal Trade Commission*, 102 F. (2d) 763, 767 (C. C. A. 4th, 1939) 18
Pratt v. *Paris Gas Light & Coke Co.*, 168 U. S. 255 .. 21, 22
Progress Corporation v. *Green*, 163 Misc. (N. Y.) 828 24
Rhea v. *Hackney*, 117 Fla. 62, 157 So. 190 31
St. Louis, Vandalia & Terre Haute R. R. v. *Terre Haute & Indianapolis R. R.*, 145 U. S. 393 14
In the Matter of Simmons Co., 29 F. T. C. 727 42
Small Co. v. *Lamborn Co.*, 267 U. S. 248 ..... 22, 23
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173 21
In the Matter of Standard Brands, Inc., 30 F. T. C. 1117 ..... 27, 44
In the Matter of Standard Oil Co., F. T. C. Docket No. 4389, decided Oct. 9, 1945 ..... 27, 44
In the Matter of John B. Stetson Co., Docket No. 5172 42
Sugar Institute, Inc. v. *United States*, 297 U. S. 553 19
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 27
Thomas v. *Iowa*, 209 U. S. 258, 263 32

Page

In the Matter of United States Rubber Co., F. T. C. Docket No. 4972 (pending) 27
Wagner Co. v. *Lyndon*, 262 U. S. 226, 232 33
Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U. S. 165 ..... 22, 23

STATUTES:

Fla. Stat. 1941, §§ 50.21, 50.27, 50.30, 90.17, 90.18, 90.19 31
Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §§ 13, 13a ..... 2 et seq.

MISCELLANEOUS:

Brown and Rubin, *The Effect of Wartime Price Control on Contracts for the Sale of Goods*, 52 Yale L. Journ. 74, 88 (1942) 14
Canned Food Pack Statistics: National Canners Association 39
Canner's Directory (1936, 1939 ed.) 39
Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8 13
80 Cong. Rec. 9563-64, June 15, 1936 25
Food Products Regulation 1, Supp. 13, C. F. R., Title 32, Ch. 11, Part 1351.478 35
Walton Hamilton, *Cost as a Standard for Price*, 4 Law & Contem. Prob. 321, 323, 333 ..... 20, 27, 40
Hearings before House Judiciary Committee on H. R. 8442, H. R. 4995, H. R. 5062, 74th Cong., 1st Sess., pp. 219-21 25
Rep. No. 2287, 74th Cong., 2d. Sess., pp. 10, 17 43
H. R. 8442, § 2(d), 74th Cong., 1st Sess., introduced June 11, 1935 13
Maximum Price Regulation 350, C. F. R., Title 32, Ch. 11, Part 1306 35
Order of the Supreme Court of Fla., Jan. 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327) 31
Order of the Circuit Court for Hillsborough County, entered June 21, 1940, adopting the rule for Pre-Trial Procedure 31
Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881, 890) 31

Page

2 Restatement, *Contracts* (1932) §§ 598-609 14
Restatement, *Restitution* (1937) § 140 14
The Robinson-Patman Act (Monograph, Wash. Post) p. 1 20
S. 3154, § 2(d), 74th Cong., 1st Sess., introduced June 26, 1935 13
S. 3154, § 2(d), 74th Cong., 2d Sess., reported out Feb. 3, 1936 13
S. Rep. No. 1502, 74th Cong., 2d Sess., p. 8 13
6 Williston, *Contracts* (rev. ed. 1938) § 1764, p. 5006; § 1768A, pp. 5074-5075 ..... 14, 15
Zorn & Feldman, Business Under the New Price Laws (1937) p. 96 19

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The Circuit Court of Hillsborough County did not write an opinion. Its findings of fact and conclusions of law appear at R. 580-582. The opinions of the Florida Supreme Court on hearing and rehearing (R. 593-601, 621) are reported in 22 So. (2d) 461.

JURISDICTION.

There is no judgment order of the Florida Supreme Court in the Record. Nor does petitioner's Designation (R. 623) contain directions to the clerk of the court below

to include such an order in the Record. The petition for a writ of certiorari was filed on September 5, 1945. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code.

QUESTIONS PRESENTED.

1. Whether the defense of illegal practices by the seller under the Robinson-Patman Act is available in a state court suit on renewal promissory notes to void the indebtedness.

2. Whether the court below properly ruled that on the facts developed in the pre-trial procedure the summary entry of judgment should be affirmed.

STATUTE INVOLVED.

The Robinson-Patman Act, in relevant part, is printed at page 54 *et seq.* of Appendix B to petitioner's brief.

STATEMENT.

The respondent American Can Company sued the petitioner, Bruce's Juices, Inc., in the Florida State Court on four renewal notes. These notes had been given by the petitioner in renewal and consolidation of a series of earlier notes given to settle an accumulated indebtedness for cans purchased. None of the renewal notes on which suit was brought is tied to a particular purchase. None of the original notes for which they had been substituted, and none of the open account sales out of which some original notes arose, had been tied to a particular transaction. (R. 373.) In part the renewal notes represented unpaid interest on the old notes. (R. 361-62.) There was no challenge to the amount of any one of the notes nor was there any challenge to the amount of the accumulated aggregate indebtedness which they represented. The principal defense offered was the allegation that in some of the sales originally made —the price of which may to some undisclosed extent have been reflected in the accumulated indebtedness—the respon-

dent had unlawfully discriminated against the petitioner in violation of the Robinson-Patman Act. It was pleaded that these allegations, if they could be proved, rendered the consideration illegal and the notes void. (R. 4-5.)

The record discloses the following: Bruce's Juices, Inc., the petitioner, is a processor of fruit juices operating canneries located at Tampa, Florida; Bridgeville, Delaware; Geneseo, New York; and Santa Rosa, Texas. It also has products canned for it at Vincennes, Indiana. (R. 378.) From 1928 to 1942 it purchased under a series of term contracts most of its cans from the respondent, The American Can Company. (R. 62-64, 106-107, 129, 377.) The remainder of its needs was purchased from The Continental Can Company. (R. 372.) Petitioner has never considered itself bound by any "corporate feudal tie" to the respondent. (Cf. Petitioner's Brief page 28.) Petitioner at the expiration of any one of the successive contracts with American Can Company was always free to contract with some other supplier for its cans, and since December 31, 1942, it has actually done so. In fact, as early as 1937 petitioner made plans to purchase all of its cans from Continental which had a factory in Tampa and at various other points throughout the country. (R. 88-89, 474, 535.)[1] Moreover, since 1942 other can manufacturers have replaced respondent as petitioner's can supplier. (R. 377)

In accordance with the customary practice in the canning industry petitioner between 1928 and 1942 bought cans from time to time under its requirements contracts with respondent. Its purchases fell into two groups. The first consisted of the standard sizes of what are known as sanitary cans and in this record referred to as *grocery* sizes. In normal times, respondent manufactures approximately 300 styles and sizes of sanitary tin cans of which five are standard size sanitary cans in wide use. (R. 545.) Respondent's factory in Tampa, Florida is equipped to manufacture several but not all the different can sizes. Petitioner purchased

[1] The Crown Can Company also operated a can manufacturing plant in Florida. (R. 535.)

grocery size cans from respondent both before and after enactment of the Robinson-Patman Act on June 19, 1936.

The second group of its purchases consisted of *individual service cans*. Beginning in 1936-1937 petitioner started experimenting in Tampa with cans of small sizes holding an individual serving of juice which it planned to sell to stores handling soft drinks. (R. 378.) It tried out cans of various sizes, including those holding five and one-half and five and three-quarters ounces. (R. 379.) In the fall of 1938, petitioner decided to standardize on a 6-ounce can which would permit competition with Coca Cola and other 6-ounce soft drinks. (R. 382, 547.) The can was sometimes supplied petitioner by respondent from Baltimore with freight equalized to Tampa, *i.e.*, absorbed by respondent to that point. Respondent installed a special manufacturing line in its Tampa factory to make the 6-ounce can, at a cost of approximately $100,000.00. (R. 547.) Respondent's cooperation in this respect and the generous line of credit made available commencing in 1937 enabled petitioner's pioneering venture to prosper. In 1939 alone when much of the indebtedness involved arose, more than 11,500,000 small cans were used by petitioner. (R. 556.)

Petitioner was a difficult account to sell and service. The uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent. (R. 353, 513, 536,)[2]

In addition, petitioner was a doubtful credit risk. In 1937 the respondent agreed to extend $125,000 in credit to the petitioner by accepting a series of interest bearing notes up to that amount. Petitioner was free to pay cash, or to give notes, or to pay part cash and give notes for the balance of any invoice. (R. 502, 503.) Each shipment made during each year was invoiced separately.[3] Some invoices

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[2] For example, respondent's records reveal that more than seventy visits per year were required by representatives of respondent to petitioner's Tampa plant. (R. 531.)

[3] See R. 526 for a typical invoice covering the sale of 48,000 small cans for $306.24.

were paid in cash; notes were given for others; and some were carried as an open account. (R. 88.) As the notes matured, they were paid in part, or replaced by other renewal notes, or consolidated in renewal notes. In 1942 all of the remaining aggregate indebtedness was consolidated in four renewal notes of approximately $114,000. (R. 579, 580.)

As already noted, petitioner did not and could not establish what portion of the indebtedness represented by the renewal notes arose after the enactment of the Robinson-Patman Act. Nor was it shown what portion of the indebtedness represented the sales price of grocery size cans or individual serving cans. For example the alleged discrimination against petitioner in the sale of small serving cans is not charged to have occurred before September 1939 (R. 182), yet the record definitely establishes that at least $102,000 of the total amount of the notes reflects indebtedness for cans purchased before September 1939. (R. 251-256.) It also seems likely that the balance of the total amount of the notes represents an indebtedness arising prior to that time (R. 88, 90), but in no event has petitioner shown that any indebtedness arose after June, 1940. (R. 579.)

The alleged discrimination through use of quantity discounts during the period when the indebtedness arose was confined to companies described as competing with the petitioner in the *grocery* size can fruit juice field. (R. 506.) The first sale of small cans to a competitor who received a quantity discount was that made to the Morgan Packing Co. in September, 1940. (R. 226.) Therefore there could have been no discrimination prior to that date resulting from any allowance of quantity discounts to a competitor purchasing small cans. Petitioner could not and did not offer any evidence to establish what portion of the total amount of the four notes represented a prior indebtedness arising out of the purchase of the grocery size cans. Petitioner's President testified merely that the earlier indebtedness, as well as the consolidated renewal notes, represented amounts due for the purchase of cans "in a blanket

way", including both the grocery size cans and the individual serving size cans. (R. 373, 374.)

Suit was instituted by respondent in the state Circuit Court on June 23, 1942, for the collection of the notes. On October 2, 1942, petitioner brought suit against respondent in the United States District Court for treble damages, pursuant to 15 U. S. C. §15, authorizing such suit in federal courts for violations of the Robinson-Patman Act resulting in injury to the claimant. (R. 501.) On October 5 petitioner filed its pleas in the state court suit.

The pleas, though general, set up five defenses. One defense was that the renewal notes had been given conditionally—on condition that adjustments be made on the amount due—and that since the adjustments had not been made, payment was not due and the notes were void. This was abandoned in the Florida Supreme Court. (R. 600.) The other four defenses were based upon alleged illegal discriminations by respondent against petitioner in the original transactions. The pleas simply recited the language of the Robinson-Patman Act and charged that the generally alleged discriminations rendered the renewal notes void.[4]

The petitioner claimed, first, that other canners were charged lower prices for cans of substantially the same grade.

Second, respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was abandoned below. Third,

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[4] The allegations that the notes are void have significance since petitioner's brief vacillates as to the status of the indebtedness and at least in one place (p. 5) suggests that petitioner's pleas were that the notes represented "the excess" charged and "the excess" was not lawfully due. An examination of the pleas (see, e.g., R. 4, 5) shows petitioner raised as a defense that the notes were given "as part of a transaction involving the sale of cans by the Plaintiff to the Defendant, and that said notes evidenced the purchase price of said cans; that the transaction involving said sales of cans was unlawful . . . therefore, the consideration for said notes is illegal and said notes void and of no force and effect." (R. 4, 5.) The same form is used in each plea.

it was alleged that illegal discounts were granted other customers. Fourth, it was contended that for the purpose of destroying respondent's competition cans were sold in Texas for a lower price than that charged petitioner in Florida.

The respondent demurred to the pleadings and also moved to strike or in the alternative compel amendment.

Pursuant to Florida law, the trial judge ordered a pre-trial conference, in part to simplify the issues and to avoid unnecessary proof by securing admissions. (R. 57-58.) In addition, he ordered the parties to present their witnesses and evidence in support of their pleadings. (R. 58.) He authorized depositions to be taken where necessary. The purpose of this procedure was declared to be "to *simplify and determine* the issues between the parties, and for the purposes hereinabove set forth." (R. 58.)

Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. The parties therefore proceeded to take evidence before the trial judge, by deposition in New York City, and again in Tampa before the trial judge. Five hundred and twenty printed pages of testimony and exhibits were accumulated. In addition, a great many other voluminous exhibits were received in evidence. These should have been printed, but were omitted by inadvertence on the part of the Clerk of the Court below and have now been filed with the Clerk of this Court under Rule 10 of this Court by order of the Florida Supreme Court.

During the taking of testimony in New York, certain questions asked witnesses were temporarily not answered and were certified to the trial court for ruling on questions of relevancy and propriety. This procedure was in accordance with the terms of the order for the pre-trial conference. (R. 39.) There was ample opportunity to secure these rulings; but no attempt was made by petitioner to secure such rulings. The questions asked were exceedingly broad

and there was good reason to believe that they were designed to harass respondent and to compel disclosure of a large amount of confidential information pertaining to the private business of numerous other customers of respondent who were competitors of petitioner. Instead respondent stipulated to certain relevant matters and relied on the trial court to determine essentiality of the other material.

After the case had been fully explored, the trial judge asked if either side wanted to take any further testimony or "if both sides are closed: both sides." (R. 578.) Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent. (R. 578.)

Subsequently, the trial court entered findings of fact and conclusions of law. (R. 580-582.) First, it found that the evidence showed execution and delivery of the notes in the specified amount. Second, it found that the evidence failed to disclose a conditional delivery. The evidence offered by petitioner was held to have fallen "far short" of showing that plaintiff ever agreed to an adjustment. Finally, the defense of illegality of consideration was held unavailable since the federal law was deemed to prescribe the exclusive remedies to persons affected by violation of the Robinson-Patman Act.

On appeal by petitioner the Florida Supreme Court, by a 5-2 vote, reversed the judgment below, holding that the defense of illegality could be interposed in the state court and that the case must go on trial. Respondent petitioned for a rehearing, asserting that the court had erred as to the law. Respondent also asked the Florida Supreme Court in the alternative to examine the evidence and affirm the judgment on what the record disclosed. (See R. 616.) Rehearing was granted and argument and briefs were submitted. After this rehearing the Florida Supreme Court filed a *per curiam* opinion in which four of the seven judges joined, stating:

> "We are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621.)

One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not "legally available as a defense in the state courts in a common law suit on the promissory notes involved."[5]

Petitioner's application for a second rehearing was subsequently denied. (R. 622.)

SUMMARY OF ARGUMENT.

I. A violation of the Robinson-Patman Act by the seller, even if one occurred, does not remove the obligation to pay for goods received by petitioner. Petitioner's contention, on analysis, necessarily is that all obligation to pay for goods received is cancelled by a price concession illegally given by the seller to another customer. Such a consequence does not flow from the Act.

The Act does not outlaw price differences. Whether illegality has actually occurred requires an examination into the collateral sales of the seller, the substantiality of the effect of the illegal discrimination on competition, and the cost justification of the seller. No single sales transaction is illegal. The Act prohibits as unlawful a *relationship* between sales where such relationship has specified effects on competition. This is quite a different matter from refusing to enforce a contract which is itself in restraint of trade in violation of the Sherman Act, an act having a common law origin.

The legislative history of the Robinson-Patman Act contains detailed discussion of the problem of enforcement. A

[5] Petitioner insists with some vehemence that the concurring judge did not join in the *per curiam* though his name is listed with the others as joining in it. There would seem to be little occasion to argue this point, though it may be noted that under petitioner's view there is no majority of the judges of the highest court of the State of Florida which has endorsed either the non-availability of the defense of violation of the Robinson-Patman Act or the non-violation of the Act by the business practices here involved. Under this view, since no controlling law has been established, it may be suggested that certiorari should be dismissed.

proposal for changing the treble damage remedy to permit recovery in a federal court without showing damage, for the difference between the price charged the most favored customer and that charged the aggrieved, was rejected. Nowhere in the debates, committee reports, or hearing was the remedy advocated by petitioner so much as mentioned.

Neither the federal nor state court is equipped to deal with such a complicated defense in the process of suit to collect a debt. The proceeding necessitated under the Act to show illegal discrimination is more involved than a rate proceeding. Among other things, effect on competition, the need to meet a competitor's lower price, and the justification of differences in prices because of difference in cost of manufacture, sale or delivery, must be examined. The need to introduce cost justification alone would render the process of collecting on commercial paper hopelessly cumbersome.

The necessary expertness and centralization necessary for a sound interpretation and application of the Act can only be provided by the Federal Trade Commission. Reliance on the state courts will simply destroy the ready collectibility of commercial paper, which is the foundation of ready credit. The Act intended to aid small business, but if petitioner's interpretation is adopted by this Court many a seller will refuse to extend credit to new enterprise or to any customer not entitled to his lowest price, for fear of endlessly being tied up in any effort to collect his money.

II. The court below properly ruled that on the facts developed in the pre-trial conference the summary judgment should be affirmed. Such judgment, after a pre-trial procedure, is in accord with settled Florida practice. The petitioner totally failed to substantiate its pleas that the renewal notes, on which suit was brought, represented the sales price for cans purchased at prices discriminating against it. Petitioner failed to identify the composition of the debt as between individual service cans and grocery cans. There was no illegal discrimination in the sale of

individual service cans. Further, during the period in which the indebtedness here involved arose, no customers in the quantity discount brackets purchased the individual service cans. Though petitioner now rests on the illegality of the quantity discounts in the grocery can field, petitioner was unable to establish what part, if any, of the renewal notes were represented by the purchase price of grocery cans. If the defense were held available under these circumstances, the rule of law would be that once an illegal sale is made of any article, the seller cannot recover for the sale of any other article, legitimate as that sale may be. The seller would become an outlaw. Petitioner has not openly contended for such a rule, but its proof has failed to show the identity of the articles represented by the debt and the articles sold to others on which quantity discounts were granted.

As to the grocery cans, even assuming that they were represented in the debt, and the extent of that representation had been proved, there was no showing of any effect on competition resulting from the quantity discounts given. Furthermore, respondent introduced cost studies establishing that savings in the cost of selling larger customers more than justified the discounts given. Though petitioner objects to a minor item of "commission" expense [redacted] charged its group, petitioner has no cause to complain about its classification, since it was an exceptionally expensive customer to sell. The Act does not require the impossible: it does not require a cost study for each customer and a different price for each customer. What was done was reasonable in the light of Federal Trade Commission rulings.

ARGUMENT.

I. The defense of illegal practices under the Robinson-Patman Act is not available in a state court suit on renewal promissory notes to void the indebtedness.

A. *Petitioner's position is that a purchaser in the ordinary course of business may refuse to pay the sales price for goods purchased on the ground that collateral illegality renders the contract unenforceable by the seller.*

Petitioner's position, stripped to its essential character, is that a price discrimination practiced in favor of its competitors creates for it a defense to a suit on an indebtedness based on transactions which in and of themselves were strictly legal. The nature of this defense is one that petitioner in its brief does not describe with consistency. Upon analysis, however, it seems clear that petitioner's position comes down to the contention that a purchaser in the ordinary course of business may refuse to pay anything for the goods bought, on the ground that the seller in the operation of his business has violated the Robinson-Patman Act. The defenses are pleaded in this manner. (R. 4-13, 41-46). Before meeting directly the real question thus presented, we shall first deal with the attempted modifications of these defenses which petitioner now suggests in its brief.

First, it is asserted that the defense is posited on a sum being due petitioner equal to the amount of price concessions that petitioner would have received if charged the same price as another customer paying the lowest price. (Pet. Brief, p. 5.) This, it is to be noted, is not a defense of voidness at all, but a kind of counterclaim in a state court for the difference between the seller's lowest price and the price charged the buyer, without the need to show competitive injury. Clearly the petitioner has the right, if it can establish damage, to sue for treble damages in a *federal* court. In creating this right Congress confined it

to the federal courts. The bill which became the Robinson-Patman Act proposed at one stage a new remedy in the *federal* court by removing the need to show injury and allowing the method of measuring recovery by the amount of price concessions given others, per unit of purchase.[6] This suggested new remedy was not adopted by Congress. Petitioner now seeks to resurrect it in the state court. It seeks to do so, furthermore, as has been noted on a plea of voidness and not by way of counterclaim.

Second, petitioner suggests that, though the notes are void as contrary to public policy, recovery on a quantum valebant theory, may nevertheless be had for the reasonable value of the cans delivered. There is no need for elaborate answer to the suggestion that the fair value of the goods has already been paid. Petitioner's brief states that the record "suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors." (Pet. Brief, p. 8.) This is wholly belied by the record. None of the notes, as petitioner's President testified, can be related to any particular transactions. (R. 373,

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[6] See S. 3154, § 2(d), 74th Cong., 1st Sess., introduced June 26, 1935; H. R. 8442 § 2(d), 74th Cong., 1st Sess., introduced June 11, 1935; S. 3154, § 2(d), 74th Cong., 2d Sess., reported out February 3, 1936. See S. Rep. No. 1502, 74th Cong., 2d Sess., p. 8:

> "The measure of damages provided in section (d) is the amount of the forbidden discrimination or allowance found to have been granted, limited however to the volume of the plaintiff's business in the goods concerned, or to the amount which he would have received had the allowance been granted to all on the equal basis which the bill requires. The underlying principle of the bill is the suppression of unjust discriminations, and it seems both fair and just, and in harmony with that principle, to enable those victimized by its violation to restore themselves, *through the recovery of damages, to the equal position which they would have occupied* had the violation not been committed." (Emphasis added.)

The Senate alone enacted this provision and ultimately receded in conference. Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8.

374.) As will be seen, a price *difference* is not an *unlawful discrimination* even apart from any question of justification under the Act.

It is submitted that if illegal discrimination renders these notes void, public policy would not permit recovery of the fair value of the cans represented by them. The law as established by this Court is clear that transactions under a contract void for illegality will not sustain quasi-contractual or other recissionary relief any more than an action upon the contract.[7]

Petitioner is thus logically driven to the position that a sales transaction legal on its face creates no valid obligation to pay for goods received where illegal concessions have been made to other customers. This is the position taken by the pleas of petitioner which allege that the promissory notes involved arose out of sales transactions and that the notes evidence the purchase price of cans, that respondent has given illegal price concessions, and that the notes are therefore void and of no force and effect. (See e.g., R. 4, 5.) No effort was made—in the pleas, in the court below, in its petition here—to consider whether the amount of the notes is less than or exceeds the amount of the alleged discrimination. No proof of competitive injury is offered. Under petitioner's argument any degree of collateral discrimination renders the notes void. Necessarily, petitioner's position comes down to arguing that if a buyer of cans has

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[7] *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 295-296 (1905); *St. Louis, Vandalia & Terre Haute R. R.* v. *Terre Haute & Indianapolis R. R.*, 145 U. S. 393, 407 (1892); *Dent* v. *Ferguson*, 132 U. S. 50, 64-65 (1889); *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 411-412 (1889); *Gesellschaft Fur Drahtlose Telegraphie M.B.H.* v. *Brown*, 78 F. (2d) 410, 413 (App. D. C., 1935), *cert. den.* 296 U. S. 618 (1935), *s. c.* 104 F. (2d) 227 (App. D. C., 1939). *Accord*, 6 Williston, *Contracts* (rev. ed. 1938), sec. 1786 A, pp. 5074-5075; 2 Restatement, *Contracts* (1932), secs. 598-609; Restatement, *Restitution* (1937), sec. 140; Brown and Rubin, *The Effect of Wartime Price Control on Contracts for the Sale of Goods*, 52 Yale L. Journ. 74, 88 (1942). None of the exceptions suggested by Williston or the Restatements of Contracts and Restitution would be remotely applicable here.

been extended a broad line of credit, whether or not reflected in notes, he may profit many hundredfold for any damage caused by some violation of a general statute. This must follow if a sales transaction legal on its face creates no legal obligation to pay for goods received in instances where collateral illegal concessions have been made to other purchasers.

Before considering whether the Robinson-Patman Act voids any sales transaction (other than a sale where both seller and buyer are parties to an illegal agreement), or adverting to the reasons which should make this Court reluctant to write into that Act what Congress specifically refused to enact, we call attention to the settled doctrine that even where a contract is forbidden, transactions under it are not *per se* void. "In determining what validity, if any, a forbidden contract has, it is often important to consider how far and for what reason the prohibited transaction is wrongful, since the courts will endeavor so to deal with the transaction as to give effect to the fundamental purpose of the Legislature and to a wise public policy."[8] See also *Harris* v. *Runnels*, 12 How. (53 U. S.) 79.

B. *The Robinson-Patman Act does not render illegal the sales transactions between petitioner and respondent.*

Petitioner grounds its claim that the notes here in suit are void and uncollectible on the allegations that respondent has violated the Robinson-Patman Act by unlawfully discriminating against the petitioner. Repeatedly it asserts that the original sales transactions were illegal on their face.[9] Its position must be measured against the statutory text upon which reliance is had.

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[8] 6 Williston, *Contracts* (rev. ed. 1938), sec. 1764, p. 5006.

[9] This assertion is made in various exaggerated forms. For example it is asserted that illegality is found "in the face of contracts admittedly discriminatory." (Pet. Brief, p. 15.) As will be seen the Robinson-Patman Act does not deal merely with price *differences*. The only thing shown by petitioner's contracts with respon-

First, turning to the penal provision of the Robinson-Patman Act, it will be seen that this section in express terms defines what conduct is unlawful. This penal provision reads:

> "Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

In its defense petitioner does not allege that the contract to which it was a party discriminated against its competitors, but, on the contrary, alleges that petitioner was an innocent party, illegally discriminated against by respondent through sales made by it to other customers, and that this petitioner vested with all the rights and remedies given

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dent are price differences. The other requisites, necessary under the statute, to demonstrate the violation are discussed below. But it is patent that a mere price difference between two transactions even though covered by the same uniform type of sales contract, in no way demonstrates that the respective purchasers were competing, that the goods were of like grade and quality, or that the requisite substantial injury to competition was present.

by the statute to such an injured party. Obviously, therefore, the contracts between these parties are not proscribed by Section 3.

Neither the civil nor the criminal provisions of the Robinson-Patman Act prohibit *differences in price*. The Act does not prohibit price discriminations. What it does prohibit are *illegal price discriminations* and it provides a definitive yardstick for measuring illegality.

To put the matter another way, no single sale is *per se* illegal under the Robinson-Patman Act. It is necessary to examine the relationship of that sale to others by the same seller. The Act is directed against the competitive effects of an unlawful *relationship* between the price charged one buyer and that charged others. Neither price by itself is controlling. None of the sales transactions thus being compared is void. Inquiry is directed to, and any violation measured by, the relationship between prices. This is a commonplace in any interpretation of the statute. If the improper relationship among a seller's prices (*i.e.*, a discriminatory difference having the prescribed effect upon competition) rendered all the respective sales transactions void because of illegality, the effect would be that the giving of a benefit of a price differential to a single customer among thousands, if finally held to be illegal, would render void and uncollectible every sale to every other customer of the seller. A forfeiture of this magnitude is worked by no statute. Nowhere in the legislative consideration of the Robinson-Patman Act was any such result ever suggested.

Turning, therefore, to the relationship between two or more sales, it is clear from the remaining text of the statute that petitioner is virtually asking this Court to rewrite the Act. For it is manifest that a difference in price is not controlling. The Act directs on its face a series of inquiries: Are the goods of like grade and quality?[19] Are the two

[19] It is likewise necessary to establish that one of the two transactions is in interstate commerce, and that the goods were sold for "use, consumption or resale within the United States."

customers in such relationship as to render the difference in price a discrimination? A discrimination in price is illegal only if it has the specified effect *and* if it cannot be justified on the ground that it makes

> "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities"

in which the goods are sold by the seller; or justified as responsive to changing conditions affecting the market for or the marketability of the goods concerned; or as having been made in good faith to meet an equally low price of a competitor.

The cardinal inquiry is as to the probable effect upon competition. The emphasis in the text of the statute on this point is clear. *Cf. Oliver Bros. Inc.* v. *Federal Trade Commission,* 102 F. (2d) 763, at 767 (C.C.A. 4th, 1939), "The effect of such discrimination" is to be examined to determine whether it may be

> "*substantially* to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . ."

Even a pronounced differential in prices may lack these requisites. Compare *In the Matter of Kraft-Phenix Cheese Corporation,* 25 F.T.C. 537.

Necessarily, recourse to the justifications provided by Congress requires examination of facts unrelated to the particular sale. Under the statute a discrimination in price having a demonstrated competitive effect may still be proper if justified by differences resulting from the differing methods or quantities sold or delivered. Ultimate violation may thus be dependent upon an examination of the seller's entire method of manufacturing or distribution. The justification of market conditions requires examination of facts even more widely dispersed than those directly

available to either buyer or seller. In like fashion, the defense of meeting competition makes illegality turn on the existence of facts rarely apparent on the face of any particular transaction or group of transactions between the individual buyer and seller.

In short, the Act does not make price differentiation illegal. Its legislative history demonstrates that all of those sponsoring it understood that price differences and price discriminations within the permitted confines of the statute is the essence of a highly competitive system. He who asserts illegality must demonstrate substantial competitive effect since price discrimination is permitted unless there are serious and substantial consequences.

> "The sponsors of the Act were not interested in preventing price discrimination as such, but in preventing the translation of such price discrimination into a competitive weapon."[11]

Thus a fixed one price system would be the essence of monopoly in cases where the cost of making goods, selling goods and delivering goods to one class of customer is different than that to another.[12] Price discrimination is thus specifically sanctioned by the Act.

Clearly, then, the Robinson-Patman Act, in purpose and in text, prohibits only those price discriminations which by collateral determinations may be found to have effects upon competition which may tend substantially to monopoly or to the substantial prevention or injury of competition at specified levels. Nowhere in its text or in its legislative history is there any suggestion that this statute, touching the web of all interrelated commercial transactions in the national economy, is to be read as rendering void on their

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[11] Zorn & Feldman, BUSINESS UNDER THE NEW PRICE LAWS (1937) p. 96.

[12] Nowhere is there clearer recognition of this than in this Court's opinion in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553.

face any particular transaction or group of transactions,[13] except where seller and buyer have conspired to violate the law.

C. *The refusal to enforce a contract restraining trade in violation of the Sherman Act is readily distinguishable.*

The Sherman Act, as petitioner has taken pains to point out, has a common law origin. It proscribes as illegal certain types of contract in restraint of trade. It was recognized in the common law that the court should not lend its aid to enforce a contract restraining trade. That policy has been carried over to the Sherman Act, so that one violator may not further the monopoly by compelling performance by another violator of a contract forbidden by the Act. The transaction can readily be distinguished from the instant one. The Robinson-Patman Act was of wholly statutory origin. It did not bar price differentiation; it tried to establish certain rules for price competition. It constituted "a venture into control" entering "new territory."[14]

The notes or contracts made with petitioner were not illegal; petitioner alleged collateral illegality in the form of price concessions given to other persons competing with it. An examination of the transactions between petitioner and respondent could not possibly reveal illegality or re-

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[13] The scope of the statute has been the subject of comment by all those who have dealt with it. Although it emerged largely out of chain store practices in the grocery field, its commercial impact is as universal as that of the Uniform Negotiable Instruments laws. "The Robinson-Patman Act is a striking example of such omnibus draftsmanship. This law is applicable throughout the whole of American industry. It affects and to a large extent controls buying and selling in every interstate transaction and in a large number of intrastate transactions. It necessitates the scrutiny of all commercial dealings in commodities beginning with the purchase of raw materials, through the manufacturing operation, and down to the sale of the finished product to the ultimate consumer." The Robinson-Patman Act (*Monograph*, WASH. POST) p. 1.

[14] Walton Hamilton, *Cost as a Standard for Price*, 4 Law & Contemp. Prob. 321, 333.

straint. The inquiry must be a collateral one and necessitates applying the standards found in the Act to examination of the entire gambit of the collateral sales to petitioner's competitors. Even under the Sherman Act collateral illegality will not void a contract itself innocent.

All the cases relied upon by the petitioner, both in this court and in the court below, were cases in which *plaintiff and defendant* had entered into a contract which was *in violation of a Federal statute and hence illegal and void, so that no action could be maintained upon it by either party.* The cases denied recovery on the illegal contracts.

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227;
Bement & Sons v. *National Harrow Co.*, 186 U. S. 70;
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173;
Embrey v. *Jemison*, 131 U. S. 336;
Pratt v. *Paris Gas Light & Coke Co.*, 168 U. S. 255.

In *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, it was held that the plaintiff and the defendant had entered into written agreements which were in flagrant violation of the Sherman Anti-Trust Law, and that the contracts of sale which were sued upon were based upon those illegal agreements, and were themselves illegal and void. The opinion distinguishes the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545, hereinafter discussed.

In *Bement & Sons* v. *National Harrow Co.*, *supra*, the suit was for breach of patent licenses. The defendant alleged that the contracts were illegal under the Sherman Act but the Court sustained the contracts and awarded damages to the complainant.

In *Sola Electric Co.* v. *Jefferson Electric Co.*, *supra*, an action to recover royalties on a patent license to which both were parties, the defendant alleged that the license was invalid and that its price fixing provisions were in violation of the Sherman Act. This Court so found. In *Embrey* v. *Jemison*, *supra*, the suit was to recover upon a wagering

contract and the Court upheld the Statute which expressly forbade recovery upon such a contract. *Pratt* v. *Paris Gas Light & Coke Co., supra*, merely decided that a state court had jurisdiction to declare certain patents invalid when the assertion of invalidity was merely incidental to the defense of the action and where the invalidity of the patent was relied upon as avoiding the contract. None of these cases show more than a superficial and fallacious resemblance to the case at bar.

But there are other decisions of this Court directly in point.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540;
Small Co. v. *Lamborn Co.*, 267 U. S. 248;
Loughran v. *Loughran*, 292 U. S. 216;
Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U. S. 165;
Geddes v. *Anaconda Copper Mining Co.*, 254 U. S. 590;
Farmers & Mechanics Nat. Bank v. *Dearing*, 91 U. S. 29.

In the *Connolly* case, the Pipe Company brought suit on promissory notes for pipe sold to Connolly. The defense was that the plaintiff had entered into a combination in restraint of trade and had thereby prevented competition and controlled prices. The court held that the transaction involved was an innocent one and collateral illegality could not be examined:—

> "If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, col-

lateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe." (184 U. S. at 549: See also opinion p. 545.)

The Court thereupon proceeded to apply the same ruling to a defense set up under the Sherman Act. (P. 550.)

In *Small Co.* v. *Lamborn Co.*, 267 U. S. 248, 252, this Court noted:

> "It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the [Anti-trust] Act provides for violations of it are exclusive."

And, in 1934, Mr. Justice Brandeis again approved the doctrine of the *Connolly* case in *Loughran* v. *Loughran*, 292 U. S. 216, 228, stating:

> "By the long line of cases following Connolly v. Union Sewer Pipe Company, 184 U. S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on. A 'person does not become an outlaw and lose all right by doing an illegal act'. National Bank & Loan Co. v. Petrie, 189 U. S. 423, 425."

Wilder Mfg. Co. v. *Corn Products Ref. Co., supra,* is an action for goods sold and delivered. The defendant alleged that the plaintiff was an illegal monopolistic combination and that it had unreasonably advanced the price of its products to the injury of the public. This latter allegation is similar to the defense here pleaded. This Court held the defense unavailable, saying in part:—

> "And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is

needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved." (236 U. S. at 172)

This case, at p. 174, announces "the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes'," citing cases.

In *Geddes* v. *Anaconda Copper Mining Co., supra*, a judgment was sought declaring void a sale of certain properties to Anaconda on the ground that they were purchased pursuant to an illegal monopolistic intent and plan. This Court held that the remedies provided by the Sherman Act being exclusive, this suit could not be maintained. In *Farmers & Mechanics Nat. Bank* v. *Dearing, supra*, which involved certain state laws forbidding usury a similar ruling was made.

We believe that there is only one reported case in which the precise question at issue in the case at bar has been decided.

Progress Corporation v. *Green*, 163 Misc. (N.Y.) 828.

This was a decision of the Appellate Term of the Supreme Court of the State of New York, First Department. The purchaser of goods in the ordinary course of business, in an action against him for the purchase price, undertook to interpose the defense that the seller had discriminated against the buyer by sales to other customers in violation of the Robinson-Patman Act. In a per curiam opinion the Appellate Term decided that the defense was not maintainable and awarded judgment to the plaintiff on the pleadings. Upon the reasoning of these cases it would seem clear that the defense sought to be interposed in the instant case cannot be maintained. Both the legislative history of the Robinson-Patman Act and practical considerations of an

elementary character in the national economy strengthen this conclusion.

D. *The legislative history of the Robinson-Patman Act affords no foundation for the defense interposed.*

The Robinson-Patman Act differs not merely in its origin and purpose from the statutes embodying common law prohibitions against restraints on trade which were available as defenses to contractual actions. In addition, it has an affirmative legislative history, already noted, showing that during its consideration by the Congress remedies were proposed, of a less drastic nature than those sought by petitioner, for obtaining in a federal court the equivalent of any illegal price advantage accorded to a competitor. The Congress ultimately decided not to depart from the old rule of requiring a showing of injury as the basis for recovery. Though thus strikingly occupied with the enforcement question, the legislators did not once allude to any "common law" right to avoid all liability for goods received, nor did they remotely suggest such a drastic and uneven penalty in their new and comprehensive regulation of trade practices.[15] The Congress in enacting the Robinson-Patman Act decided to rely for its enforcement upon the Federal Trade Commission, and upon the federal courts in treble damage actions, in injunction suits and in criminal prosecutions. It did not intend to impose upon state courts the burden of developing Federal law in this pioneering field, nor to authorize any court, state or federal, to assess a drastic and uneven penalty not based on actual injury.

[15] In the Committee proceeding and on the floor of the Senate and House there were frequent references made to the available remedies for enforcement of th Act. Although some thought the remedies inadequate and others thought treble damage suits too severe, *not once* in the course of Congressional consideration was there any mention or suggestion that the Robinson-Patman Act might be pleaded in bar of a suit for the sales price of goods purchased. See, *e.g.*, 80 Cong. Rec. 9563-64, June 15, 1936; Hearings before House Judiciary Committee on H. R. 8442, H. R. 4995, H. R. 5062, 74th Cong., 1st Sess., pp. 219-21.

E. *Practical considerations militate against a construction saddling Federal and state courts with the burdens attendant upon such a defense as petitioner asserts.*

The size of the Record in the instant case will give the Court some idea of what an examination into alleged improper price discrimination entails. Petitioner asserts the proceeding was never completed. That is an unfounded charge since the trial judge proceeded on the theory that all relevant evidence should be allowed to go in before ruling on the facts or the law of the case and did not close the hearing until he was satisfied that both parties had presented all of their relevant evidence (R. 578). It does, however, emphasize that a state court, having jurisdiction to try actions on promissory notes, is not the place to try out the complex economic issues of substantiality of probable effect on competition, relative cost of supplying or selling groups of customers, or justification by meeting competition.

Resort to a federal court in treble damage actions is said by petitioner to be impracticable (Br., p. 26), although it has instituted against respondent this very type of action. The facilities of a state court are usually more confined, and altogether inadequate for dealing with the complex issues involved. Moreover, the burden on the court, of dealing with a defense of illegality under Section 1(a) of the Robinson-Patman Act, is far greater than the burden on the court in dealing with treble damage actions. This is because the complainant in a treble damage action is confined to proving actual damage to himself; on the other hand, the defense of illegality would require the court to deal with the much larger question whether price discrimination was shown which was obnoxious to any provisions of the Act.

By a curiously inverted application of the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the petitioner has sought to premise its defense upon the need for uniformity in the application of a federal statute. We submit that it is ob-

vious that the supervisory jurisdiction of this Court cannot control and give uniformity to the findings of federal and state courts throughout the country on the complicated factual issue of the probable effects of a price discrimination upon competition generally. Essentially the Federal Trade Commission must lead the way in interpreting the law and applying it.[16] The theory of primary jurisdiction, whether controlling here or not, as a matter of law, has a common sense foundation in the practical problems of the administration of justice. For example, *In the Matter of Standard Brands, Inc.*, 30 F.T.C. 1117, involved an investigation into alleged unlawful price discrimination by Standard Brands. The study required resulted in a transcript consisting of 4805 pages.[17] The cost study entailed in fixing public utility rates has ben deprecated as inconsequential compared to the problems of the "hazardous attempt at police" stemming from cost justification under the Robinson-Patman Act.[18] The development of a sound policy under an experimental law, "which presently will reveal its own defects and invite abandonment or amendment,"[19] cannot be achieved by the widely dispersed federal and state courts. These courts cannot be expected to develop the "mechanisms of control" in the course of fulfilling the vital but routine role of providing a forum where commercial paper may be enforced.

No court, state or federal, can develop a uniform and comprehensive interpretation of the Robinson-Patman Act, that will permit it to perform a useful function in regulating trade practices without at the same time hampering com-

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[16] Cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[17] See also *In the Matter of Goodyear Tire & Rubber Company*, 22 F. T. C. 232 (1936); *In the Matter of Standard Oil Company*, F. T. C. Docket No. 4389, decided October 9, 1945; and the respondent's printed cost study in *In the Matter of United States Rubber Company*, F. T. C. Docket No. 4972 (pending), for further illustrations of the complexities of cost justification.

[18] Walton Hamilton, *op. cit. supra*, p. 333.

[19] Walton Hamilton, *op. cit. supra*, p. 333.

petitive pricing, which is the essence of a system of free competition. The task of construction should rest primarily with the Federal Trade Commission. This is particularly true since under the first section of the Act the Commission is specifically authorized to exercise quasi-legislative functions in establishing permissible quantity discount limits. In this connection, it seems significant that when Mr. Smith, General Counsel for the respondent, was asked on the witness stand whether the Federal Trade Commission had been advised as to the respondent's system of discounts at the time that it was set up, counsel for the petitioner objected and the testimony was excluded. (R. 579) In printing the transcript of Mr. Smith's testimony as Appendix D of Petitioner's Brief, this item was perhaps inadvertently omitted.

The centralization of interpretative and administrative functions in the Commission does not prevent recovery by injured parties through resort to the statutory remedy in the federal courts. In fact, after the Commission had acted and resolved the complicated fact-law questions involved in such a proceeding, the controversy would be reduced to proportions which could be handled effectively by a trial court.

F. *Practical business considerations show that the Congress could not have intended to allow a defense of voidness, based on collateral Robinson-Patman Act violations, to a suit on promissory notes.*

The essence of commercial credit is ready collectability. That means that a defense premised on some collateral violation of the Robinson-Patman Act constitutes a serious threat to the system of commercial credit of the country. Any recalcitrant debtor could harass his creditor and endlessly delay payment for goods received by demanding the right to investigate the entire business structure of the seller, the nature of every sale to other buyers, and the circumstances under which those sales were made before he

could be required to pay his debt. The seller, furthermore, would be required to open his business records and establish cost justification, or the need to meet competition in collateral sales, to collect on a negotiable instrument. All this would be done in a suit to collect the purchase price of goods sold in a transaction untainted with illegality but involving a sale by a seller who is charged with departing from his customary and legal price schedules to grant another buyer an unlawful price concession.[20]

The practical impact upon ordinary commercial operations of permitting the defense here sought to be imposed to be made in a suit for the sales price of goods purchased in the ordinary course of business may be seen without elaboration. In the first place, the adequate exploration of the issues controlling and determining any violation of the Robinson-Patman Act impose formidable burdens. As already seen, the Act does not seek to confine one to doing business in a straight jacket. It recognizes, and its legislative history indicates, that the Congress desired to foster the giving of lower prices in response to different costs of manufacture, sale or delivery. However zealous a manufacturer may be in following the explicit and implicit statutory direction, to demonstrate his compliance would require extensive, highly detailed, and costly proof. In those cases in which the Federal Trade Commission, aided by its experfness in the field and its staff familiar with the intricacies of cost accounting, has ultimately concluded that violation did not exist, it has found it necessary to have the most comprehensive data developed by the seller concerned.

With issues thus ranging as far afield as comparative costs of manufacture in one or more factories, conditions

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[20] Petitioner's contention necessarily assumes that the lowest price charged any customer is the seller's only legal price, since it is asking this Court's aid in obtaining that price. But it would be more plausible to hold that the seller's legal price, on the assumption that he can have but one, is the price at which he customarily sells, and that only the departures from that price are illegal. On this basis the petitioner is asking this Court's aid in obtaining an illegal price.

in two or more markets at particular times, differences in the cost of selling various classifications of customers—any one of which comprehends not merely the transactions with a complaining buyer, but may embrace the entire business of the seller—it is apparent that in many instances the cost of demonstrating compliance with the statute would far exceed the amount in suit.

Even in the case of an admitted violator of the Act, recognition of petitioner's position that such violation renders the transaction void and defeats recovery for the sales price would in effect convert the Robinson-Patman Act into the most drastic forfeiture statute yet presented to this Court. In sales to a particular customer totaling $100,000, an alleged discrimination of 5 per cent would amount to $5,000. Yet on petitioner's theory the illegality of the transaction defeats recovery for an amount twenty times the amount of the discrimination. Moreover, if the giving of a higher price to one customer renders all sales to all other customers at higher prices wholly illegal, the penalty for violation would thus run many hundred-fold the amount of the discrimination.

These direct consequences of the view here asserted by petitioner can lead only to the withdrawal of credit. If there is one thing that is clear it is that the Robinson-Patman Act was meant to aid the small merchant in competing against the chain. The petitioner now seeks to forge a weapon that will strike at the heart of commercial credit, and at small business. Once the certainty of collection on goods sold on credit is destroyed, many sellers would have but one recourse. That recourse will be a refusal to extend credit. Only in that way can a lengthy trial, resembling a public utility rate proceeding, in an attempt to collect the purchase price, be avoided. For the larger companies, and those having a large borrowing power with local banking institutions, the termination of sales on credit will involve no hardship. It is the small business enterprise, and especially one that is just entering the field or engaged in expansion of its operations, that will be seriously weakened. Bruce's Juices, though not small, would likewise have been

greatly handicapped by the development of a business policy refusing it credit. When it pioneered in the small can field in 1936-1937, it had available a generous line of credit which will be shut off to it hereafter by every can manufacturer if the defense it is urging is held to be available. It is unbelievable that the Congress which passed the Robinson-Patman Act intended to shut off the efforts of new concerns to enter the competitive field, or of small concerns to expand their activities and grow financed in part by credit obtained from their suppliers.

II. The court below properly ruled that on the facts developed in the pretrial procedure the summary entry of judgment should be affirmed.

A. *There was no departure from accepted State Practice in the proceedings below.*

The taking of testimony as part of a pre-trial procedure and upon respondent's motion to strike or compel amendment is in accord with the settled practice of the Florida Courts, duly authorized by the State Statutes and by the court Rules. The effort of the court is directed toward defining the issues and ascertaining whether the complaint or pleas interposed have a foundation in fact. In the event that no relevant substantiation can be advanced in support of the complaint, on the one hand, or the pleas, on the other, summary judgment is entered.

Fla. Stat. 1941, §50.21, 50.27, 50.30, 90.17, 90.18, 90.19;
Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881-890);
Order of the Supreme Court of Florida entered January 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327);
Order of the Circuit Court for Hillsborough County entered June 21, 1940, adopting the rule for Pre-Trial Procedure;

Hillsborough County v. *Sutton*, 8 So. (2d) (Fla.) 401;
Brash v. *Ehrman*, 56 Fla. 153, 47 So. 937;
Rhea v. *Hackney*, 117 Fla. 62, 157 So. 190, 194.

In the case at bar the respondent interposed a motion to strike or to compel amendment of the pleas. The nature of the charges contained in petitioner's pleas apparently suggested to the trial court the desirability of utilizing the pre-trial procedure for determining the real nature of petitioner's grievances. (R. 4-13; 57.) After all relevant evidence had been taken, the record contained no showing that the Robinson-Patman Act had been violated by respondent. Accordingly, the Florida Supreme Court entered judgment on the facts for respondent in keeping with Florida practice which does not require submission of the case to a jury under these circumstances. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. A similar practice of entry of summary judgment on the basis of affidavits or interrogatories is well known in federal courts. The affirmance by the Florida Supreme Court of the judgment entered by the trial court obviously involved approval of the procedure by which the judgment had been obtained.

The charge that the procedure followed was improper under state practice does not present a federal question. Couching this argument in terms of preventing abridgement of "a right established by federal law" through "serious departure from the ordinary requirements of proper process in a state court" adds nothing. (See Pet.'s Br. p. 10.) There is no federal right more fundamental than the constitutional right to due process of law, but that does not relieve petitioner of the obligation to raise what is essentially a due process objection in the court below. A federal due process objection must be specific. *Thomas* v. *Iowa*, 209 U. S. 258, 263. None whatsoever was interposed in petitioner's application for rehearing,[21] in its assignment of errors, or at any other stage below.

Moreover, even if the due process question had been injected into this case, a jury trial is not a prerequisite of due

[21] The application of petitioner for rehearing was not designated for printing, but an examination of it shows no claim of deprivation of rights under the Fourteenth Amendment by the proceeding below.

process in State Courts. *Wagner Co.* v. *Lyndon*, 262 U. S. 226, 232. And it is certainly not necessary state procedure to submit issues of fact to a jury when a trial court, or an appellate court acting on the record, has become advised under appropriate procedure that judgment must in any event be summarily entered.[22]

Petitioner's reliance on the allegations of the pleas as a basis for asserting that the issues should not have been determined is unwarranted. A complete and lengthy hearing was held to afford petitioner an opportunity to support those pleas with evidence or have judgment entered against it. The vague charges of the reluctant debtor in its pleading have lost all legal significance. Such are the unsupported charges that closing equipment was furnished without charge to larger customers than Bruce, or that freight equalizations were not offered uniformly on particular cans to respondent's factories, or in other legitimate ways to meet competition. These charges were made without evidence to support them, though as will be noted *infra*, petitioner was seeking to obtain exceedingly valuable trade information in a highly competitive industry on the pretense of searching for such evidence.

B. *No unlawful discrimination occurred in the sale of small cans.*

An examination of the unchallenged facts produced in evidence demonstrates that there was ample basis for the court's conclusion that no discriminatory practices on the part of the respondent had been shown.

In the small can field,—the individual service can,—proof of probable substantial effect on competition was specifi-

[22] It is clear in this case that the appellate court was convinced that the evidence was such as to require summary judgment. There was no need for it to make findings of fact, or have the trial court make them. That is entirely a matter of local procedure and state practice in expediting litigation.

cally and exclusively directed to competition in the south, particularly in the New Orleans area, with a smaller company, Engleman Gardens, a Texas competitor of petitioner operating a cannery some distance from Houston, Texas. (R. 66.) Engleman packed grapefruit juice and marketed it as "One-Up" in the New Orleans area. (R. 120, 395.) This Texas company packed its juice in 1940 in a 5¾-ounce can. (R. 387.) The distributor of petitioner's 6-ounce juice, grapefruit and others, met competition and was forced to exert extra effort to sell his product. (R. 387.) The 5¾-ounce can, without extras for lithographing, was supplied at a price of $9.68 per thousand, f. o. b. Houston, where the can was manufactured by respondent. (R. 544.) At the same time petitioner was sold the 6-ounce can, on which it had standardized because of the advantages in competitive selling, at $10.14 per thousand, f. o. b. Tampa. (R. 65.)[23] Petitioner's contention was that the $9.68 price offered in September, 1939 (R. 182), for sales of cans which first took place in 1940 (R. 544, 565) was discriminatory because it represented too large a differential from the current price of the 6-ounce can. It was contended that the 5¾-ounce and 6-ounce cans were the same because the consumer ultimately paid the same price for the *fruit juice* packed in the two different cans. (R. 68.)

Assuming for a moment some sort of unlawful discrimination as a result of this price differential on cans offered for sale in September, 1939 and first sold in 1940, it is apparent that the sales transactions which gave rise to $102,000 of the indebtedness composing the subject matter of the suit were entirely free and clear of any taint of illegality from the sale of small cans. For that portion of the indebtedness had arisen, and the sales represented by it had occurred, prior to September, 1939 and prior to the controlling date of sale of the 5¾-ounce can at $9.68 beginning in 1940. Although there is reason to believe (R. 88, 90) that the transactions represented by the $12,000 note

[23] Petitioner last used the 5¾-ounce can in January, 1939. (R. 379.)

also occurred in 1939, that is not clear. (R. 579.) Only as to this portion of the indebtedness is the question of possible illegality in the small can field of significance.

But, even as to this small amount, petitioner's proof fell short. The freight paid by Engleman to ship the 5¾-ounce can to its Texas cannery from Houston where the can was manufactured brought the total delivered price to $10.18 per thousand to Engleman (R. 66), as compared to the $10.14 price paid by petitioner for the 6-ounce can sold f. o. b. Tampa, where it was manufactured. Under the Act the probable effect on competition must be measured by the can cost to the competing canners.[24] Petitioner got its individual serving cans at $10.14. Engleman got its smaller individual serving cans at $10.18. Petitioner is in no position to complain of discrimination.

Furthermore, the undisputed evidence shows that the additional amount of tin plate in the 6-ounce can alone cost the respondent around fifty cents per thousand. (R. 541, 542.) This amply demonstrates what was apparent all along, *i. e.*, the two cans are not the same product, and there was therefore no obligation upon respondent to charge the same price. Indeed, the evidence adverted to discloses that the additional cost of producing the larger can would make it economically impossible to charge the same price as that charged for the smaller container. It is true that the 5¾-ounce can of fruit juice was sold competitively against the 6-ounce can of fruit juice. That does not make the two cans supplied the canners the same product. Indeed, it does not even make the packed fruit juice the same product so as to require the same selling price. The OPA has recognized that both cans and canned products of varying sizes must be separately priced.[25] Surprisingly enough, this

[24] Cf. *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746.

[25] See Maximum Price Regulation 350, C. F. R., Title 32 Ch. 11, Part 1306; Food Products Regulation 1, Supplement 13, C. F. R., Title 32, Ch. 11, Part 1351.478.

claim of discrimination in the small can field was the heart of petitioner's complaint when reduced to concrete form by the pre-trial proceeding.

Petitioner also asserted illegality grounded on a failure to quote it a price of $9.68, f. o. b. *Tampa* on another size can. This was a somewhat smaller individual serving can. Respondent quoted it a price of $9.68 f. o. b. *Baltimore*, the nearest factory where respondent produced it. (R. 285.) The Robinson-Patman Act does not require that respondent equalize or absorb the freight to its own factory at Tampa on a product which it manufactures and sells at Baltimore. This second can was never manufactured at Tampa. (R. 545.) When the respondent sold this same can to another customer in Florida, the customer was obliged to pay freight from Baltimore to Tampa. (R. 548.)

As to the quantity discount on the small cans we do know this: that, of the total indebtedness, $102,000 arose before September, 1939. (R. 579-580.) We also know that the balance of $12,000 probably arose before then as well though it may have arisen a little later.[26] But petitioner has not shown that any indebtedness arose after June of 1940, even on the $12,000 note.

Up until the time this debt was all incurred, in the small can field the only proof made of probable substantial effect on competition was in the competitive battle against Engleman Gardens and its "One-Up" grapefruit juice of the 5¾-ounce size. Engleman received no quantity discount[27] and we have shown that there was no illegal discrimination in the differences of price. There were some larger purchasers of cans who received quantity discounts and who purchased small cans, but they did not purchase small cans

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[26] (R. 579.) Accepting this record reference, though Mr. Bruce twice testified to an earlier origin of the indebtedness (R. 88-90), petitioner has not established that any indebtedness arose after June of 1940.

[27] What is more, since Engleman did not object, all of its transactions with American Can were offered for petitioner's inspection. See Petitioner's Brief, Appendix C, p. 59, for one such offer.

until *after all the indebtedness involved in this law suit had arisen.*[28] There were no quantity discounts given for purchases of small cans during the period when the instant debt was incurred except, in one year, to petitioner itself. (R. 469.)

It appears that the charge of discrimination in the sale of individual service cans was disproved both as to the alleged discrimination in the named prices and in respect to the quantity discount. Thus petitioner's entire claim of discrimination so far as it relates to the individual service cans falls to the ground.

C. *Since there was no illegal discrimination as to individual service cans and since petitioner failed to identify the portion of its indebtedness arising out of sales of other than individual service cans, respondent was entitled to summary judgment.*

A cardinal fact that must not be forgotten in this case is that petitioner has not established what sales transactions are represented by the current indebtedness. Petitioner's president testified that the indebtedness represented can purchases in a "blanket way." (R. 373, 374.) Some purchases were paid for by cash; others were credit sales. As already seen, petitioner's charges of discrimination collapsed with respect to the individual small service cans. This was its principal charge. Insofar as the grocery size cans are concerned, the facts adduced by petitioner on issues it had to support fell completely short of prima facie proof. Petitioner did not establish what part of the present indebtedness arose from the purchase of these grocery size cans.

There was no discrimination shown in the sale of any small can currently being purchased by Bruce's Juices.

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[28] Libby, McNeill & Libby and Morgan Packing Co. are the discount customers who bought small cans. Their purchases were all after the indebtedness arose. (R. 226.) Nor was there the slightest effort to show any probable lessening of competition, as there was in the case of Engleman.

There was no discrimination in sale of the 6-ounce can. And there is no showing what part of the indebtedness is represented by purchase of other cans. Petitioner has never so much as suggested that it can show what part of the debt represents transactions involving sales of grocery cans. It totally failed to produce such proof.

Whatever the situation, petitioner cannot escape this burden of showing that the indebtedness represents cans on which it paid a greater amount than that charged by respondent to other customers and that that constituted illegal discrimination. Petitioner would otherwise be asking for a rule of law that once there had been discrimination the seller could not collect money due it from a sale of an item *having no counterpart in a sale to another of the same item at a different price.*

The consequence of this state of the record is that summary judgment was the only action logically possible. Petitioner's pleas do not ask for a rule ostracizing a violator from ever collecting the purchase price of one product from a person to whom a sale of another product may once have been made at a price discriminatorily high. Petitioner's pleas rather sought to spell out that the transactions forming the basis for the notes were discriminatory sales. But petitioner has not established this. And no animadversions against respondent can supply this basic defect of proof on this issue as to which it is conceded petitioner had the burden.

D. *Respondent's quantity discounts were justified and were not improper discrimination.*

Even if Bruce's Juices had shown what part of the debt was represented by its purchases of grocery cans, so as to make the question of quantity discounts of relevance in this case, no illegality would have been established. This is true, first, because no substantial effect on competition was shown by Bruce's Juices as being the result of the discounts actually granted; second, because the quantity discount

schedules of the respondent were justified under the express terms of the statute.

By way of showing that the discounts on cans had a substantial effect on petitioner's sales of fruit juice to the grocery trade, petitioner stated that it competed in the grocery field with certain customers who received quantity discounts on its can purchases. (R. 506.) The nature of this competition with the large packers was on a price basis. It is not shown that petitioner's business in grocery cans fell off, or that its competitor's business increased. It is not shown that the canners in Florida decreased in number, or that they packed less juice. In fact, the opposite is actually the case.[29] This effect of substantial injury to competition is a *sine qua non* to illegal discrimination. Petitioner did not show that any injury resulted and that that injury could be attributed to respondent's discounts. In fact, in one of the years, 1939, when the indebtedness arose, petitioner was itself a discount-receiving customer. In view of the failure of proof of this statutory requisite of violation, examination of respondent's cost justification is largely unnecessary.

As to the justification of the discount schedules, apparently petitioner in its brief has overlooked the fact that the cost data supporting the discounts granted to the various classes of customers is part of the Record before this Court. The clerk of the court below inadvertently failed to transmit them to this Court in the first instance and therefore they do not appear in the printed Record. However, they

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[29] In spite of the fears expressed in petitioner's brief of "concentration of economic wealth" unless the defense of illegality is allowed, without such a defense the number of canners in Florida increased from 67 in 1936 to 77 in 1939; the canners of grapefruit juice, from 33 in 1936 to 45 in 1939; the canners of orange juice, from 11 in 1936 to 35 in 1939. CANNER'S DIRECTORY (1936, 1939 ed.). The pack of grapefruit juice in Florida increased from 1,608,287 cases for the 1935-36 season to 4,916,312 cases for the 1938-39 season. CANNED FOOD PACK STATISTICS: NATIONAL CANNERS ASSOCIATION. The citation of the amount of profit in a case of canned goods involved in the 1930 *Ladoga* decision is not indicative of probable effect on competition for purposes of the instant case.

were later certified and filed with this Court under Rule 10. (Plaintiff's Exhibits 2 to 14 inclusive.) There is no basis for petitioner's charge that the discounts, based on savings in selling costs, were founded on speculation and estimates. As Mr. Smith testified, when the Robinson-Patman Act was passed, the discounts then being granted were larger. Although they were legal under the Clayton Act, it was felt they might not be justified under the Robinson-Patman Act. The business experience of the Company made it aware, however, of the fact that it cost less to sell the large accounts than the small ones. Cost studies were made at great expense and these differences in selling costs were established by day to day recording of every item of selling expense which was incurred. There is no basis for saying the Company "fell back . . . upon a system of cost accountancy which . . . rested upon no more secure foundation than hypothesis" (Petitioner's Brief, p. 33). The Company compiled actual data of costs of selling the various classes of customers. The charts submitted broke down the various items of cost and gave the figures both in dollars and in percentages. These charts are Plaintiff's Exhibits 5 to 14. There is no occasion for petitioner's characterization of the cost accounting justification as "made-to-order" (Petitioner's brief, p. 37). The Act contemplated and in fact demanded that such cost studies be compiled and be available to justify quantity discounts.[30]

Petitioner objects because of the classification of customers. Petitioner cannot contend that separate costs of selling must be computed for each customer. It is difficult to see how petitioner has any standing to complain because of the averaging of costs, since the uncontradicted evidence in the present Record reveals that the relative cost of selling and servicing petitioner exceeded that of any other customer. (R. 513, 531, 536.)

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[30] "The Robinson-Patman Act is the law of the land. Trial is to proceed by the ordeal of cost accountancy." Walton Hamilton, *op. cit. supra*, p. 323.

The petitioner also contends that the information supporting the cost studies was not made available in New York and that the trial court did not pass on the certified questions which various witnesses had declined to answer. The trial court allowed all relevant evidence to be introduced. It did not fall in line with plans to harass respondent and require production of confidential business information relating to the business of petitioner's competitors. Counsel for respondent made this formal offer: "The plaintiff will make the records of the company available to the defendant's auditors for the purpose of examining the details listed in Exhibits 5 to 9 for identification." (R. 238.) These exhibits contained the figures in dollars and in percentages of all sales expense incurred for each class of customer. Counsel for petitioner answered: "All right, we will arrange the detail on that." Petitioner's counsel then asked, further, to see the individual accounts of each and *every* customer to determine the accuracy of sales figures in Exhibits 10 to 14. (R. 239.) Counsel for respondent replied that the company would permit an examination of its records relating to Exhibits 10 to 14 so far as it would be permitted to do so by its customers. (R. 239.) Further than this, the auditor who had prepared these exhibits was then on the stand prepared to testify as to their accuracy. The petitioner's counsel immediately lost interest. (R. 240.) It is difficult to see how the acounts of every customer of respondent for the years 1936 to 1942 could have been checked if petitioner was unwilling to take the time to check the sales expense supporting documents.[21] This Court cannot be asked to assume the function of policing the exclusionary rules of the state courts nor the discretionary power of state judges. The appellate judges, deciding this case on the

[21] The harassing nature of the request to check customer accounts is emphasized by the failure to confine the request to the period when the indebtedness arose. It is not respondent's good faith that should be questioned. The tactics employed were designed to harass, not to secure information and verification.

facts had the right to rule out harassing tactics designed to delay resolution of a case for months.

The broader objection to the discount plan is grounded on the differences, however small, in serving individual customers. Petitioner argues that respondent's justification "disregarded the actual expense of serving individual purchasers of cans." (Brief, p. 33) It also asserts that, in five cited cases,[32] the Federal Trade Commission has held that "this price system [of respondent's] on its face violates the prohibition of the Robinson-Patman Act." There is no basis for this assertion of criticism by the Federal Trade Commission.

The Robinson-Patman Act was never intended, and has never been interpreted, to have the result of requiring as many separate discounts as a seller has customers to take care of differences in selling costs, however slight. The Act nowhere precludes volume discounts as such. The legislative history of the Act is replete with evidence of the intent and purpose of Congress to permit the continuance of volume discounts that "make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing *methods* or *quantities* in which such commodities are to such purchasers sold or delivered." [Emphasis added] It was the intent and purpose of Congress that these words should have meaning. Differences in selling cost between individual customers arising from other causes than differing methods or quantities in which the goods are sold or delivered, can not avail to justify differences in selling price to such customers. The House Committee Report stated:

> "Any physical economies that are to be found in mass buying and distribution, whether by corporate

[32] *In the Matter of H. C. Brill Company, Inc.*, 26 F. T. C. 666 (1938); *In the Matter of Master Lock Company*, 27 F. T. C. 982 (1938); *In the Matter of American Optical Company*, 28 F. T. C. 169 (1939); *In the Matter of Simmons Company*, 29 F. T. C. 727 (1939); *In the Matter of John B. Stetson Company*, Docket No. 5172. In not a single one of these cases did the seller offer a cost justification of its discounts.

chain, voluntary chain, mail-order house, department store, or by the co-operative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—*none of them are in the remotest degree disturbed by this bill . . .*" (H. R. No. 2287, 74th Cong., 2d Sess., p. 17) (Emphasis added.)

They would indeed be disturbed—in fact would be precluded altogether—if there can be no averaging of costs to different volume groups, and if, as between any one purchaser and any other, the seller must be able to prove, on penalty of being unable to enforce payment of a just debt, the precise cost difference of selling to the two from whatever cause arising. But the same House Report also stated that the Act permits price differentials based upon cost differences that can be shown to exist "between the customers or *classes of customers concerned.*" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 10.) (Emphasis added.) And this has consistently been the interpretation of the Robinson-Patman Act by the Federal Trade Commission, the agency primarily charged with its enforcement.

In the *Goodyear* case[33] the Commission accepted a cost study which compared the cost of selling Sears, Roebuck and Company with the *average* of the cost of selling to independent tire dealers, and it permitted to be averaged the items of direct selling expense used in respondent's four-year cost study. Moreover, it announced as the basic and realistic principle which the Commission has followed in enforcing the Robinson-Patman Act that

> "a discount is not to be condemned merely because it does not mathematically accord with cost differences.

[33] *Matter of Goodyear Tire & Rubber Co.*, 22 F. T. C. 232 (1936). On appeal the case was dismissed as moot, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 92 F. (2d) 677 (C. C. A. 6, 1937), but was reversed by this Court, *s. c.* 304 U. S. 257. See, also, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. (2d) 620 (C. C. A. 6, 1939), cert. den. 308 U. S. 557.

The problem is a practical one and must depend on the effect and intent of the scheme as a whole." (pp. 329-30)

In the *Kraft-Phenix* case[34] the Commission sustained discounts, ranging up to 10% on the averaged differences in the cost of delivery to purchasers of different volumes. In the *Bissell* case[35] the Commission dismissed, on the basis of a similar cost justification, a complaint involving annual quantity discounts to different groups of purchasers. The minimum and maximum discounts examined were three times the minimum and maximum quantity discounts of respondent, and dismissal was grounded on the Commission's finding that "respondent's justification . . . on the basis of different service costs for the different *classes of purchasers* paying the different prices" satisfied the Act. In these cases the Commission sustained volume discounts, in whole or in part, on a cost justification *as between classes of customers*. In other cases, though finding the particular cost justification inadequate, it has never impugned, and has by clear implication approved, the averaging of costs as among classes of customers. *In the Matter of Standard Brands, Inc.*, 30 F. T. C. 1117 (1940); *In the Matter of Standard Oil Company*, F. T. C. Docket No. 4389, decided October 9, 1945.[36]

Petitioner's objection to the respondent's cost justification comes down to one point. This is that the no-discount

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[34] *In re Kraft-Phenix Cheese Corporation*, 25 F. T. C. 537 (1937).

[35] *In re Bissell Carpet Sweeper Co.*, F. T. C. Docket No. 4636, March 6, 1945.

[36] Obviously a seller cannot charge to any one of his discount groups the whole or any part of the expenses incurred in selling to another group. This the respondent has not done. Nor can a seller charge to any one group a disproportionate share of an item, such as home-office overhead, which is deemed by the Commission to be allocable per sales dollar to all sales. *In the Matter of Goodyear Tire & Rubber Co., supra; In the Matter of Standard Brands, Inc., supra.* For this reason the respondent did not include home-office overhead in the expenses which it distributed among its discount groups.

group as a group was charged with commissions paid on purchases by customers in that group, although no such commissions were paid in Florida. The argument is that petitioner is being charged with commissions not actually paid on purchases by him. There are three answers to this point.

In the first place, petitioner's purchases were not confined to Florida, and for aught that the record shows commissions were paid on his purchases outside of Florida, the volume of which he has not shown.

In the second place, "commissions" were one of the items of expense that the Federal Trade Commission in the *Goodyear* case allowed to be averaged among all independent tire dealers, without a showing that they were paid proportionately on sales to all such dealers. In short, a member of a legally determined discount group may properly be charged with his proportionate share of the total selling costs for that group, even though particular expense items may not have been incurred in connection with particular sales to him. The legal approach is still "a practical one."

In the third place, respondent's discount system would remain valid, even if the item of commissions were omitted in the calculations; and this is the only item of the costs charged to the no-discount group that the petitioner attacks. The Act requires only that "due allowance" be made. Omission of item of commissions would not significantly affect the justification.[37]

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[37] The commissions charged to the no-discount group totaled $108,390.36 in 1938, out of total expense of $2,280,465.44 charged to that group; $76,498.95 in 1939, out of total group expense of $2,325,196.20; $123,715.02 in 1940, out of total group expense of $2,470,438.86; and $126,316.73 in 1941, out of total group expense of $2,514,736.02. (Plaintiff's Exhibits 6-9.) The complete omission of this item of commissions would have reduced the percentage of selling expense to sales, for the no-discount group (as shown on Plaintiff's Exhibits 11-14) from 5.98 per cent to 5.703 per cent in 1938; from 6.598 per cent to 6.382 per cent in 1939; from 6.876 per cent to 6.532 per cent in 1940; and from 5.718 per cent to 5.431 per cent in 1941. The savings in selling costs to the 5 per cent discount group, as compared with the no-discount group, would ac-

Thus the record makes it clear that the determination of the Florida Supreme Court was correct that "on the facts" in this case no showing of violation of the Robinson-Patman Act could be made. The lack of identification between the renewal notes and any specific sales transactions, the fact that the debt arose almost wholly prior to the time of any alleged discriminatory sale to others, and the absence of any showing of violation either as to small cans or grocery size cans was called to the Court's attention (R. 614-16) and is uncontradicted of record. And if in this absence of any proof of violation, it had been deemed necessary to refer to respondent's cost justification, likewise fully before the Court, this three-year study abundantly showed the complete validity of the discounts as applied to the grocery size cans.

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cordingly have been reduced from 5.396 per cent to 5.112 per cent in 1938; from 6.098 per cent to 5.882 per cent in 1939; from 6.321 per cent to 5.977 per cent in 1940; and from 5.308 per cent to 5.021 per cent in 1941. Similarly, the average savings in selling costs to all discount groups, as compared with the no-discount group, would have been reduced from 5.161 per cent to 4.877 per cent in 1938; from 5.977 per cent to 5.761 per cent in 1939; from 6.207 per cent to 5.863 per cent in 1940; and from 5.119 per cent to 4.832 per cent in 1941. Even without the item of commissions, the savings in selling expense to the 5 per cent discount group, as compared with the no-discount group, thus in all instances exceeded the discounts paid to that group; and the average savings in selling expense to all discount groups, as compared with the no-discount group, in all instances exceeded the total amount paid in discounts.

The figures on Plaintiff's Exhibits 11-14 can easily be broken down, by reference to the data on Plaintiff's Exhibits 6-10, so as to show the average of the savings in selling costs to the intermediate discount group of 1 per cent, 2 per cent, 3 per cent and 4 per cent. If this is done, then for these four groups the percentage of selling costs to sales was .964 per cent in 1938, .687 per cent in 1939, .729 per cent in 1940, and .733 per cent in 1941. Thus, again disregarding the item of commissions charged to the no-discount group, the average in savings of selling costs to the four intermediate discount groups, as compared with the no-discount group, would have been 4.739 per cent for 1938, 5.695 per cent for 1939, 5.803 per cent for 1940, and 4.698 per cent for 1941. The total average savings for the four intermediate discount groups in each instance exceeded the maximum discount of 4 per cent that was paid to any one of such groups.

CONCLUSION.

For the foregoing reasons the judgment below should be affirmed.

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